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No. 00-1003

IN THE
Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,
Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF IN OPPOSITION OF RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION, *ET AL.*

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STATUTES

Mass. Gen. Laws ch. 150E, § 12 2

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BRIEF IN OPPOSITION OF RESPONDENTS MASSACHUSETTS TEACHERS ASSOCIATION, *ET AL.*

Respondents Massachusetts Teachers Association ("MTA"), *et al.* (hereinafter the "Union respondents"),[1] respectfully urge the Court to deny the Petition for Writ of Certiorari, which raises no unsettled legal issue worthy of this Court's attention.

[1] In addition to MTA, this Brief in Opposition is submitted on behalf of respondents National Education Association ("NEA"), Andover Education Association, Arlington Education Association, Bridgewater Education Association, Chicopee Education Association, Fairhaven Education Association, Faculty-Staff Union, Holyoke Education Association, Massachusetts Society of Professors, New Bedford Education Association, Quabbin Education Association, Springfield Education Association, Tantasqua Education Association, Wareham Education Association, Woburn Education Association, and Education Association of Worcester.

STATEMENT OF THE CASE

Massachusetts, like many other states, allows public-employee unions to negotiate with employers for contract provisions requiring all members of the represented bargaining unit to contribute to the cost of the collective bargaining services the union provides. Mass. Gen. Laws ch. 150E, § 12. Pursuant to such "agency fee" provisions, an employee who elects not to join the union that represents his or her bargaining unit is required to pay a monthly service fee. A nonmember who objects to paying full union dues ("objecting nonmember") can, however—under both the Massachusetts statute and federal constitutional law—be required to pay only a reduced fee equivalent to his or her pro rata share of the union's expenditures related to collective bargaining, grievance adjustment, and other representational functions.

This Court has, as a First Amendment matter, required that unions collecting an agency fee establish procedures through which objecting nonmembers may challenge the union's calculation of their reduced fee and obtain "a reasonably prompt decision by an impartial decisionmaker." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 (1986). In Massachusetts, the Supreme Judicial Court has construed the state's agency fee statute as "giv[ing] the dissenting employee the option of bringing a prohibited practice complaint before the Labor Relations Commission if the employee wishes to challenge the fee amount." *School Committee v. Greenfield Educ. Ass'n*, 385 Mass. 70, 85, 431 N.E.2d 180, 189 (1982).

The petitioners in this case ("feepayers") are education employees who are members of bargaining units represented by the Union respondents. Between 1987 and 1992 they filed a total of 429 prohibited practice complaints with the Massachusetts Labor Relations Commission ("Commission") challenging the amounts of the reduced agency fees for fiscal years 1987-88 through 1991-92 assessed by MTA and the

other Union respondents. The Commission consolidated all of these charges in the instant proceeding.[2]

Pursuant to an agreement of the parties, MTA's expenditures for the fiscal year 1990-91—which formed the basis for the agency fee it assessed for 1991-92—were to be used as the basis for resolving the charges from all five years. Following extensive discovery, an administrative law judge conducted 53 days of hearings in 1993 and 1994, during which MTA offered 72 exhibits and the feepayers offered 1,048 exhibits. MTA and the feepayers subsequently submitted post-hearing briefs, in June 1995, of 282 and 531 pages, respectively. In March 1996, the administrative law judge issued recommended findings of fact and conclusions of law of more than 200 pages. *See* Appendices to Petition for Writ of Certiorari ("Pet. App.") 100a *et seq*. The judge found that MTA had proved its entitlement, for the test year, to an agency fee of $144.41—a reduction of $26.29 from the fee MTA had claimed. Pet. App. 304a.

Both sides filed challenges to the administrative law judge's recommendations, and the Commission issued its Decision and Order on April 23, 1997. *See* Pet. App. 25a *et seq*. While generally adopting the hearing officer's findings, the Commission made minor changes that resulted in an agency fee of $143.93. Again, both the feepayers and the unions appealed, and the Supreme Judicial Court allowed a direct appeal. Following briefing and argument, the court

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[2] The Commission considered separately and dismissed the portions of these charges challenging the adequacy of the unions' financial disclosure to nonmembers, except as to three local unions, as to which the Commission, in a separate proceeding, ultimately upheld the disclosure challenges. In both instances, the Supreme Judicial Court affirmed and this Court denied certiorari. *See Belhumeur v. Labor Relations Comm'n*, 411 Mass. 142, 580 N.E.2d 746 (1991), *cert. denied*, 503 U.S. 1004 (1992); *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 430 Mass. 81, 713 N.E.2d 363, *cert. denied*, 528 U.S. 1062 (1999).

issued its decision on September 21, 2000. Pet. App. 1a *et seq*. The court affirmed the Commission's decision with three minor modifications (two favoring the unions and one favoring the feepayers), and remanded to the Commission for entry of an appropriate order.

ARGUMENT

The decision of the Massachusetts Supreme Judicial Court raises no issue that warrants review by this Court. The court below relied entirely on well-settled law and, in applying that law to the facts of this case, broke no new ground in any respect. There is no conflict between the decision below and that of any other appellate court with respect to any issue raised by the Petition. Nor is there any basis whatever for petitioners' request that this Court revisit the fundamentals of the law of agency fee.

I. THE PETITION IDENTIFIES NO UNSETTLED QUESTION OF LAW REQUIRING RESOLUTION BY THIS COURT

In their first and second questions presented, petitioners point to several specific respects in which they argue that their First Amendment rights were violated in this case. They are unable, however, to identify any conflict between the holding of the court below and that of any other appellate court with respect to any of these issues. While we think it clear that the decision below was in fact correct in respect to all of the issues raised by the Petition, the more pertinent point is that none of those issues is legally unsettled, and none, therefore, merits this Court's plenary consideration.

A. Petitioners' initial contention is that the Commission proceeding, having stretched on for many years, failed to provide the "reasonably prompt decision by an impartial decisionmaker," on challenges to the amount of the agency

fee, that is required by *Hudson*, 475 U.S. at 307. *See* Petition for Writ of Certiorari ("Pet.") at 18-20. We submit that the Supreme Judicial Court was correct in holding that the length of the proceeding was justified by the particular circumstances of the case. *See* Pet. App. 8a-9a.[3] In any event, petitioners cannot be heard to complain that they were denied the right to a "reasonably prompt" resolution of their agency fee challenges because of the length of the Commission's proceeding, when it was they who chose the Commission as the forum for their challenge to the Union respondents' agency fees.

While feepayers in Massachusetts have "the option of bringing a prohibited practice complaint before the Labor Relations Commission" as a means of challenging the fee amount, *Greenfield*, 385 Mass. at 85, 431 N.E.2d at 189, the availability of that option in no way prevents them from

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[3] Not only was this a test case that resolved hundreds of claims from many years and established the Commission's framework and procedures for resolving agency fee challenges in the future, but the length of the proceeding was also, as the court below pointed out, Pet. App. 3a, 8a-9a, attributable in large part to the actions of petitioners themselves. Thus, after the Commission dismissed the portions of the charges alleging that the unions had provided constitutionally inadequate notice, the feepayers sought a stay of the proceedings pending their appeal of that dismissal. After the Supreme Judicial Court issued its opinion affirming the Commission, the feepayers again (albeit this time unsuccessfully) sought a postponement pending this Court's resolution of their petition for certiorari. Once the Commission's hearing began, the feepayers spared no time and effort to make the case as complex and time-consuming as possible—introducing no less than 1,048 exhibits (compared to 72 offered by MTA) and filing a post-hearing brief of 531 pages. Petitioners (with the concurrence of MTA) twice sought extensions of the briefing schedule on the ground that the record was so voluminous. Under these circumstances, petitioners' complaint that the Commission proceeding took too long has all the appeal of the proverbial boy who murdered his parents and then sought the court's mercy because of his status as an orphan.

instead invoking the rebate procedure established by MTA and its affiliates pursuant to the requirements of *Hudson*, 475 U.S. at 307-08, under which an impartial decisionmaker appointed by the American Arbitration Association ("AAA") determines whether the unions have met their burden of proving the chargeability of the fees they seek. To invoke this arbitration procedure, a nonmember feepayer need only send a letter to the treasurer of the local association that represents him or her; the burden is then on the unions to prove in the arbitration proceedings their entitlement to their fees. Because the AAA arbitration procedure was not invoked here, the record does not disclose how long it would have taken for the feepayers to have obtained a resolution of their agency fee challenges in that way; but AAA arbitration procedures established by other NEA affiliates typically resolve agency fee challenges within a period of months after the challenge is filed, and have accordingly been approved by the courts as meeting *Hudson*'s requirement of a "reasonably prompt" decision. *See, e.g., Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1377 (9th Cir.), *cert. denied*, 510 U.S. 964 (1993).

Perhaps more to the point, this case raises no unresolved legal issue that requires this Court's attention. Despite their efforts, petitioners have failed to demonstrate that the views of the court below with respect to *Hudson*'s requirement of a "reasonably prompt" decision are in conflict with those of any other appellate court. In their effort to conjure up a circuit split, petitioners cite decisions from the Sixth, Seventh, and Ninth Circuits that they assert to be contrary to the decision of the Supreme Judicial Court. *See* Pet. at 18-19. But those decisions dealt with a different question from the one presented here. Most of them involved facial challenges to the constitutionality of union-established procedures for the resolution of agency fee challenges, and the question presented was whether these procedures complied with *Hudson*'s requirements—including the requirement of a

"reasonably prompt" decision. *See Perry v. Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) (pre-*Hudson* case); *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Grunwald*, 994 F.2d at 1376-77.[4]

The instant case, on the other hand, involves no facial challenge to union procedures (or any other procedures) for the resolution of agency fee challenges. Rather, petitioners have opted to bring their agency fee challenges through a state agency proceeding, and the question is whether their First Amendment rights were violated because of the length of time that proceeding took. For the reasons stated above we think it clear that the answer to that question is "no," but the critical point is that this is a different question than the one addressed by the cases on which petitioners rely. There is, accordingly, no conflict among the courts that requires this Court's resolution.

B. Petitioners next take issue with the Supreme Judicial Court's rulings with respect to the chargeability of overhead and meeting expenses. Pet. at 20-22. It is settled law that union activities necessary to maintain the union's existence and functioning are chargeable to objecting nonmembers,

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[4] The other federal appellate case cited by petitioners, *Tavernor v. Illinois Federation of Teachers*, 226 F.3d 842 (7th Cir. 2000), is a bit nearer to the mark in that it, like this case, involved a state agency procedure for the resolution of agency fee challenges. But the issue presented in *Tavernor* was not the one petitioners raise here—*i.e.*, whether the mere fact that a challenge procedure takes more than a certain length of time constitutes, without more, a violation of the feepayers' rights under *Hudson*. Rather, the question the court addressed in *Tavernor* was whether, in light of the fact that agency fee challenges took more than a year to resolve under the procedures of the Illinois Education Labor Relations Board, it was unconstitutional for the union to require agency feepayers to pay into escrow, pending resolution of the challenge, 100% of the amount of union dues, including the approximately 15% that the union conceded would not be chargeable to objecting feepayers. *See id.* at 848-51. That is an issue that is not raised by the instant case.

notwithstanding that such activities may to some extent support or be commingled with nonchargeable activities. The leading case is *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), where this Court held that union conventions were fully chargeable:

> Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions such as those at issue here ... seem to us to be essential to the union's discharge of its duties as bargaining agent.

Id. at 448-49; *see also id.* at 456-57 (same result under First Amendment analysis). The Court reiterated its position on this point in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 529-30 (1991).

The Supreme Judicial Court followed these holdings. It rejected petitioners' contention that when both chargeable and nonchargeable activities were part of a union meeting or conference, the entire event should presumptively be held nonchargeable, Pet. App. 10a-13a, and it applied the *Ellis/Lehnert* principles in upholding the chargeability of union overhead expenses such as accounting. *Id.* at 14a-16a.[5]

Petitioners rely—as they did below—on dicta in *Schneider v. Colegio de Abogados*, 917 F.2d 620, 633-34 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992), a bar dues case

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[5] The court agreed with the Commission that "overhead expenditures necessary to maintain the union's organizational existence, such as rent, property insurance, accounting and auditing costs, and the costs of a union convention, are presumed to be fully chargeable unless there is evidence that the expense was incurred in furtherance of an exclusively nonchargeable activity," Pet. App. 14a-15a, noting that such expenses "will be incurred in roughly the same amounts regardless of the amount of the union's nonchargeable expenditures." *Id.* at 16a.

from Puerto Rico, in which the court advanced the hypothetical situation of a bar meeting at which prayers for the health of Fidel Castro and an address by "a prominent Sandanista" would "likely" give such an ideological coloring to the atmosphere that the entire meeting should be held nonchargeable. That is not a fact pattern that bears any resemblance to the issues that were before the Commission in this case, and the First Circuit's dicta certainly do not suggest that there exists any conflict between the holdings of that court and the Supreme Judicial Court that would require this Court's intervention.[6]

C. Petitioners' contention with regard to evidentiary burdens, Pet. at 22-24, not only raises no unsettled legal issue—petitioners do not even claim it does—but rests largely on a misrepresentation of what the Commission did. Petitioners assert that the Commission shifted to them the burden of proof with respect to the chargeability of the union's expenditures, by "[a]llowing the union to prove its political [*i.e.*, nonchargeable] activities . . . instead of its legitimate, chargeable activities . . . ." Pet. at 24.

The evidentiary framework adopted by the Commission, and approved by the court below, for analyzing challenges to the amount of agency fees is fully consistent with this Court's teaching on the subject. In *ALPA v. Miller*, 523 U.S. 866 (1998), this Court made clear that while it was the union's burden to prove the chargeability of its expenditures, that did not mean that feepayers could "file a generally phrased complaint, then sit back and require the union to prove the

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[6] The only other appellate decision cited by petitioners with respect to overhead and meetings is *Beck v. CWA*, 776 F.2d 1187 (4th Cir. 1985), *en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988). Petitioners do no more than list the *Beck* decision in a string citation, without explanation or reference to a particular page, and our perusal of the 38-page opinion has found nothing that could be said to be in conflict with the decision of the Supreme Judicial Court in this case.

'germaneness' of its expenditures without a clue as to 'which of its thousands of expenditures' the objectors oppose." *Id.* at 878. Rather, armed with the notice required by *Hudson*, as well as appropriate discovery, "an objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable." *Id.*

Although its decision predated *Miller*, the Commission adopted a remarkably similar framework. The Commission explained that the union's burden of proof under *Hudson* "does not mean ... that a union must present exhaustive evidence in its case-in-chief about every single union expenditure and every specific union activity during the period for which the fee is claimed." Pet. App. 33a. Rather, the union's initial burden was to present a *prima facie* showing that its chargeability calculations were correct:

> Once a union makes its *prima facie* showing of chargeability, the objecting fee payer assumes a limited *burden of production* to probe the union's evidence and produce some evidence to rebut the union's *prima facie* showing.... However, *at all times, a union retains the ultimate burden of persuasion.*

Pet. App. 34a (emphasis added); *see also* Pet. App. 4a-5a.

Petitioners claim that the unions escaped their burden of proof with respect to the chargeability of staff time, in that the Commission accepted admissions of political activity as sufficient proof that the nonadmitted activities were chargeable. Pet. at 5a-6a, 22a-24a. That assertion, based on the Commission's crediting an affidavit that *inter alia* admitted that certain staff activity records had been miscoded, is simply incorrect. As the Supreme Judicial Court recognized in rejecting this same contention, "the record is clear that the union introduced, and the commission credited, other evidence to support the allocation of staff time." Pet. App. 13a n.12.

Review of the Commission opinions in their entirety abundantly supports that conclusion, and in any event this Court does not sit to review the accuracy of lower-court determinations of the sufficiency of the evidence in particular cases. There is no legal issue here that warrants review by this Court.

D. Finally, petitioners complain that they were denied their First Amendment rights because purchasing the transcript necessary for judicial review cost them $25,000. Leaving aside the novel suggestion that invoking the First Amendment somehow entitles petitioners to cost-free judicial review, petitioners have again simply misrepresented the facts. In response to petitioners' complaint about the expense of the transcript, the Commission's hearing officer offered them two alternatives: (a) the Commission would tape record the hearing, with the tape serving as the official record of the proceeding; or (b) the union would provide a transcript, at its expense, and the feepayers would have access to the Commission's copy of that transcript at the Commission's offices. Tr. IX 1337-1344. The feepayers declined to adopt either of these options, evidently preferring instead to preserve their ability to complain about the "burden" this litigation has placed upon them.

II. THE PETITION'S REQUEST THAT THIS COURT RECONSIDER WELL-SETTLED FUNDAMENTAL PRINCIPLES OF AGENCY FEE LAW HAS NO BASIS IN THE RECORD OF THIS CASE

While, as we have just seen, the first two questions presented advance claims that are entirely unfounded and raise no legal issues requiring resolution by this Court, they at least have the merit of resting on the factual and legal record that is now before the Court. The same cannot be said of the third question presented, in which petitioners invite the Court

to jettison nearly half a century of agency fee jurisprudence—what they label the "*Street* experiment"[7]—because of alleged problems in the way their agency fee challenges were resolved in this case. Pet. at 12-17.

It is one thing to argue that the procedural and substantive requirements this Court has established to protect the First Amendment rights of agency feepayers were not complied with *in this case*. That is what petitioners argue—erroneously, we submit—with respect to their first and second questions presented, and it is an argument that can be resolved by looking to the record of this case. It is an altogether different matter, however, to assert that not only were the agency fee challenge procedures at issue in this case insufficiently protective of feepayers' First Amendment rights, but that "*all* challenge procedures . . . contain such high transaction costs that they of necessity unduly burden Free Speech rights." Pet. at i (emphasis added).

Whether that is true cannot, obviously, be determined from the record in this case alone, and nowhere do petitioners cite *any* evidence that any "challenge procedure[]" other than the one at issue here is inadequate. Their argument, rather, relies solely on the facts of this case. *See, e.g.*, Pet. at 13 ("the reality of what has occurred *in this case*"); *id.* at 16 ("*Here*, the record reveals . . .").

Over the course of the last several decades this Court has—while upholding the constitutionality of the agency fee, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)—elaborated extensive protections for feepayers' First Amendment right to refuse to help support union expenditures for political and ideological purposes unrelated to the union's role as exclusive bargaining representative. Thus, the Court has both limited the types of expenditures for which a union can charge objecting nonmembers, *see, e.g.*,

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[7] *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and set out procedural safeguards that must be applied by unions seeking to collect agency fees. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *ALPA v. Miller*, 523 U.S. 866 (1998). These decisions, and the dozens of others from the lower federal and state courts that have expanded on them,[8] have established a workable system for "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). Petitioners offer no reason for this Court to revisit the fundamental principles established by these cases.

* * *

In short, petitioners' contention that the court below erred in deciding this case presents no certworthy issue; and their attempt to generalize the issues of this case into a broader question about the viability of this Court's agency fee jurisprudence rests on nothing but a well-developed flair for hyperbole.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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[8] The one such case that petitioners cite—*Tavernor*, *supra*—offers them no support. In contrast to the approach advocated by the Petition, the *Tavernor* court responded to what it saw as a problem involving "transaction costs" not by "sound[ing] the alarm," Pet. at 16, but by addressing specifically the narrow problem it identified. *See* 226 F.3d at 847-51 (discussed *supra* note 4).

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